Overstreet, Greg (ATG)

From: ATG WWW Email AGO
Sent: Thursday, January 12, 2006 1:36 PM
To: Overstreet, Greg (ATG)
Subject: Public Record Comments

The following message was submitted to the Office of Attorney General:

From: Clay, Paul
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WA
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Comments:

Please accept these comments to the Attorney General's proposed Public Records Act – Model Rules. The 'Introductory Comments' section of the proposed rules states that the "overall goal of the model rules is to establish a culture of compliance among agencies and a culture of cooperation among requestors...." This purported and laudable goal seems to imply the desire for balance between the needs of those who request records and those who respond. After attending one of the AGO's public forums and after reading the model rules, concerns exists about whether this goal has been attained or was even sought. Initially, a lack of balance seems evident from the very process used by the AGO to seek input on the model rules. Let's start with the AG's "advertisement" for the public forums. The ad features a file room door labeled "Public Records" with a "Keep Out!" sign taped to it. Below the sign is the Attorney General's theme phrase "Not a Good Sign For Good Government." The advertisement is prominently displayed on the home page of the Attorney General's website and served as the link to information about the model rules as well as for submitting comments. The same advertisement was handed out at the public forum I attended. The advertisement implies that the Attorney General's agenda is to prevent government agencies from abusing the public records laws. While that is certainly a laudable and timely goal, it ignores other equally laudable and timely goals. Specifically, it ignores the need to prevent abuse of the public records laws by private interest groups and citizens. At the very least it ignores the need to provide a balanced approach to public records laws. Likewise, the fact that a private interest media group co-sponsored the "Open Government Forums" raises serious concerns about the Attorney General pandering to that interest over others. Daily newspapers are rightful advocates for their own particular interests. Often, those interests are consistent with the interests of the public at large. Many times, however, they are not. In the interest of balance and objectivity, the Attorney General should have avoided co-sponsorship of the forums. In doing so, the AGO might have obtained considerably more opinions contrary to those of the co-sponsoring, local media. As it stands, the public forums seemed designed to do little more than support an existing political agenda. Overall, I hope your office can appreciate that you have, at the very least, set yourself up for the perception that you are biased and that your approach in the Model Rules is unbalanced and politically charged. Turning to the Model Rules themselves, the most

helpful aspect of the rules is that they provide citations to statutes and cases where applicable. However, the model rules inappropriately try to clarify issues that have yet to be resolved by either the legislature or the courts and, in doing so, ignore important interests that may not coincide with those of the AGO's co-sponsors. The Model Rules should clarify only what is expressly set forth in case law and statute. The three examples below are used to help demonstrate the apparent lack of balance in the rules, the potential for abuse by requestors, and the lack of authority in the law for the AGO's position on the issues presented in each example. First, WAC 44-14-07001 states that an "agency cannot charge a 'redaction fee'...for the copying required to redact records before they are inspected...." Two problems arise from this statement, a practical one and a legal one. From a practical perspective, the AG's proposal can result in extreme abuse of the records law by a requester who asks to "review" extensive documents, all of which happen to need redaction. Under the AG's proposed rules, when engaging in redaction, an agency must first copy the originals (since originals should not be redacted according to WAC 44-14-05004(4)(b)(i)), then redact the copied materials, then copy the materials again to make them available for review – all without charge to the requestor. As mentioned above, the AG seems to ignore that this is ripe for abuse by a requestor bent on forcing an agency to spend public tax dollars for no good reason. From a legal perspective, a question exists about the accuracy of the AG's interpretation of the law. The law is hardly a model of clarity on this issue. On the one had, RCW 42.17.300 states that "[n]o fee shall be charged for the inspection of public records" and"[n]o fee shall be charged for locating public documents and making them available for copying." On the other hand, RCW 42.17.300 states that "[a] reasonable charge may be imposed for providing copies of public records ...." One fair reading of these three sentences is that no fee shall be charged for inspecting and locating public documents, but a fee may be charged for copying that is needed for redaction prior to review. Another fair reading of these three sentences is that no fee shall be charged for inspecting and locating public documents and a fee shall only be charged if a requestor asks to take a copy. Given the lack of legal clarity and the potential for abuse from a bad faith request, this issue needs to be resolved by the courts or the legislature, not the AGO. A second example of the AGO extending an unbalanced interpretation of the law is with regard to its statement in WAC 44-14-05004(4)(b)(i) that "[o]riginals should not be redacted." There is simply no authority for such a proposition and, again, the AGO ignores the many situations where redaction of an original might be the most cost effective method for dealing with a request while presenting no negative consequence to the public, the agency, or the requestor. A third example of the model rules setting forth unbalanced guidance beyond what is in the act or case law is with regard to the attorney-client privilege. In particular, WAC 44-14-05004(4)(b)(i) provides that, while the body of a memorandum containing legal advice could be redacted under the attorney-client privilege exemption, the "to" and "from" information is not typically exempt and generally should be disclosed. Again, not only is there no authority for this, but such a practice would be incredibly burdensome to an agency. As described above, an agency would have to copy the original, redact all of the information on the copied materials and then copy the document again for review. All of this to produce a "to" and "from" header? Wouldn't it be just as fair to a requestor for an agency to simply assert the exemption while describing the type of exempt documents? The public agency thus avoids copying and other preparation costs, while the requestor obtains the same information as if a redacted copy is provided. In all, the AGO provides in proposed WAC 44-14-00003 that the model rules are advisory only and not binding. The AGO then engages in a self-congratulatory statement by suggesting that agencies and requestors ought to do what the AGO says because of the statewide "hearings" and comments from a wide variety of interested parties. As mentioned above, one must question whether the AGO's process hasn't pandered to less than a "variety of interested parties." Given the AGO's one-sided, propagandistic advertisement of the

statewide "hearings" and given co-sponsorship with a private interest group, one has to wonder if numerous private citizens as well as employees of public agencies were (and are) rightfully hesitant to make their opinions known to the AGO. From the perspective of this private citizen, the AGO would be advised to adopt a bit more humility as to the value of its own process and as to its ability to fairly articulate what a public agency "should" do. I would suggest that the AGO's model rules be carefully limited to a recitation of the current state of law as it is expressly set forth in statute and cases, with references and citations for requestors and agencies to use as resources. As to the rest, allow the law to develop as it has done for the history of our jurisprudence—through acts of the legislature and decisions of the courts. While I appreciate the work that went into the development of these model rules, the rules seem unbalanced and focus too much on government agencies' abuse of the public records laws while ignoring other problems such as abuse of the public records laws by private interest groups and citizens. I hope these comments are helpful.